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April 24, 1961

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M-27

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Dear Mr. Isaacs:

This is in reply to your letter of March 1, 1961, in which you raise certain questions with respect to the status of the Hudson and Manhattan Corporation ("H & M"), the reorganized Debtor, the Hudson Rapid Tubes Corporation ("HRT"), and their respective employees under the Railroad Retirement and Railroad Unemployment Insurance Acts after the consummation of the Plan of Reorganization of the Hudson and Manhattan Railroad Company, Debtor.

The Trustee of the Debtor ("Trustee") has been since December 14, 1954, an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts with respect to the ownership and operation of the Hudson Tubes, an electric railroad, and the ownership and operation of certain real estate in downtown Manhattan, New York City, consisting principally of the Hudson Terminal Buildings at 30 and 50 Church Street. All the employees of the Trustee (1,058 at February 1, 1961) are employees under the Acts.

The changes contemplated by the Plan of Reorganization, which you expect to be consummated shortly, are set forth in a memorandum dated March 1, 1961, attached to your letter, as follows:

"... the Debtor's railroad property, other than the portion that constitutes any part of the Hudson Terminal Buildings or the land on which they are situated, and all the Debtor's railroad operations, will be transferred to a newly organized subsidiary, Hudson Rapid Tubes Corporation ('HRT'). The reorganized Debtor will be known as Hudson & Manhattan Corporation ('H & M') and will continue to own and operate the Hudson Terminal Buildings and other real estate, in addition to owning all the capital stock of HRT.

"H & M will continue to own all the outstanding securities of HTB,... At the date of consummation of the Plan ('Consummation Date'), the Trustee and approximately 964 employees of the Trustee will become employees

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of HRT, which will operate the railroad and be an 'employer' as defined in the Railroad Retirement Act and related statutes. At the Consummation Date, approximately 94 employees of the Trustee will be employed by H & M. The Trustee will become President of H & M and of HRT, but will receive all his compensation from H & M. Four employees of the Trustee will become officers of H & M and of HRT, and will also receive all their compensation from H & M.

"The annual gross revenue of H & M following consummation of the Plan is estimated at approximately \$3,500,000 based upon present occupancy, or \$5,180,000 based upon a 3% vacancy ratio, after completion of the pending rehabilitation program in the Hudson Terminal Buildings. The annual gross revenue of HRT following consummation of the Plan is estimated at approximately \$7,617,000.

"After consummation of the Plan, H & M will perform certain services for HRT, and HRT will perform certain services for H & M. It is estimated that approximately 20 of the employees of H & M, including officers, will devote some of their time to services performed by H & M for HRT. It is estimated that approximately 34 of the employees of HRT will devote some of their time to services performed by HRT for H & M.

"No employee of either company will receive compensation from the other company, or be considered as an employee of the other company. All services rendered by either company to the other will be billed at cost, pursuant to inter-company contractual arrangements. The costs billed will include allocated portions of the compensation of the personnel (including officers of H & M) of each company devoting time to that company's services for the other company, plus a percentage thereof for overhead.

"The sole purpose of these inter-company arrangements is to provide for the economical operation of the business of each company. It is estimated that the total amount to be billed annually by H & M to HRT, pursuant to these inter-company arrangements, will be approximately \$95,000, representing approximately 2.7% of H & M's gross revenue based upon present occupancy, and 1.8% based upon a 3% vacancy ratio.

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"It is estimated that the total amount to be billed annually by HRT to H & M, pursuant to these inter-company arrangements, will be approximately \$32,000, representing approximately 0.4% of HRT's gross revenue.

"HRT will lease from H & M space below the ground level of the Hudson Terminal Buildings for the tracks and terminal facilities of HRT, at an annual rental of approximately \$170,000. HRT will also lease office space from H & M on the ground floor of the Hudson Terminal Buildings, at an annual rental of approximately \$35,000. The total rent received from HRT will be approximately 5.9% of the gross revenue of H & M, based upon present occupancy, and 4.0% based upon a 3% vacancy ratio.

"All the employees of H & M will occupy premises owned by H & M and not under lease. All the employees of HRT in the Hudson Terminal Buildings will occupy premises leased to HRT."

Since the changes contemplated will in no way affect the operation of the railroad, it is my opinion, as you have concluded, that HRT will be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts and the individuals on its pay rolls will be employees under the Acts. (Presumably there will be similar coverage under the Railroad Retirement Tax Act, which is administered by the Internal Revenue Service.) Although H & M will be under common control with HRT and will be performing services in connection with railroad transportation, such services do not appear substantial in relation to H & M's total revenues, and may therefore be considered "casual service" within the meaning of the exception clause pertaining to affiliated companies in Section 1 of the Acts. Accordingly, H & M will not be an employer under the Acts, and would therefore be covered by the Social Security Act, the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

Inasmuch as individuals on the pay roll of H & M will be performing services for HRT as employees of H & M and individuals on the pay roll of HRT will be performing services for H & M as employees of HRT, the status of these individuals as employees of H & M and HRT, respectively, will not be affected by their services for the other company; they will remain exclusively employees of the company on whose pay rolls they appear. This will not, of course, be true of the officers on the pay roll of H & M who will also be officers of HRT, since as officers of both companies they would be employees of both companies and the fact that they will be paid directly by one company would not mean that they are not "in compensated service" --

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(certainly their service for the other company would not be gratuitous). Their compensation will be creditable under the Acts to the extent attributable to service for HRT.

Individuals who have ten years of creditable service under the Railroad Retirement Act will, if otherwise qualified, be entitled to the retirement annuities provided thereunder (including disability annuities under the conditions specified), in addition to any retirement benefits they may be entitled to under the Social Security Act.

Individuals over the age of sixty-five who have been employed by the Debtor and the Trustee for ten years or more and who will be employed by H & M may not, in my opinion, receive retirement annuities under that Act while working for and receiving compensation from H & M. To permit them to do so would defeat the purpose of Section 2(d) of the Act, for employment with H & M would be merely the continuation of the same employment, and not new employment such as is permitted under Section 2(d).

The service and compensation of an individual with less than ten years of creditable service under the Railroad Retirement Act will be credited under the Social Security Act as if Social Security Act service and compensation in determining eligibility for, and the amount of, social security benefits for himself, his wife, other members of his family and his survivors.

A person does not need ten years of creditable service to be eligible for normal benefits under the Railroad Unemployment Insurance Act, or for temporary extended benefits under the Temporary Extended Railroad Unemployment Insurance Benefits Act of 1961. It is for the purpose of receiving extended or accelerated unemployment insurance benefits under the amendments of May 19, 1959, to the Railroad Unemployment Insurance Act that the number of years of service is relevant. The eligibility of an individual for Railroad Unemployment Insurance benefits depends on whether he has at least \$500 earnings in the calendar year preceding the "benefit year" regardless of whether he is working for an "employer" or non-employer at the time he becomes unemployed. However, generally an individual may not receive benefits for the same days of unemployment under the Railroad Unemployment Insurance Act and under any other public unemployment system.

I trust that the foregoing answers all the questions raised in your letter.

Very truly yours,

Myles F. Gibbons
General Counsel